Mahendran a/l Manikam v Pendakwa Raya

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42-4-95
KC VOHRAH J
6 SEPTEMBER 1996

Criminal Law *— Penal Code (Malaysia) — ss 375 & 376 — Statutory rape — Whether sexual acts took place before prosecutrix's 16th birthday*

Criminal Procedure *— Charge — Duplicity of — Whether such duplicity is a mere irregularity*

The accused was charged under s 376 of the Penal Code (FMS Cap 45) ('the Code') for raping a girl aged 15 years 10 months between 15 November 1993 and January 1994. At the close of the prosecution's case the trial judge amended the charge to one of the accused having committed rape on the girl between 15 November 1993 and 21 January 1994. In amending the charge the judge mentioned that the accused had raped the girl twice during the period from 15 November 1993 and 21 January 1994. The accused was convicted on the amended charge. However the charge upon which he was called to make his defence and upon which he was convicted was one single charge of rape. Among the issues for consideration were: (i) whether the sexual acts took place before the prosecutrix's 16th birthday; (ii) whether there was a duplicity of the charge; and (iii) whether such duplicity was a mere irregularity.

Held, allowing the appeal:

(1) The prosecution's case related to two acts of unlawful sexual intercourse on two different dates and at two different places. There were clearly two distinct offences and therefore two separate charges ought to have been framed against the accused (see p 279B–C).

(2) Ordinarily the duplicity in a charge may be treated as a mere irregularity unless the duplicity consisted of two alternative charges in the charge and it was important for the accused to know with certainty with what he was charged and of what he was convicted (see p 279C); *See Yew Poo v PP* [1949] MLJ 13, *Yap Leow Swee v PP* [1937] MLJ 225, *PP v Mohamed Fathi* [1979] 2 MLJ 75 and *Ramachandran v PP* [1972] 2 MLJ 183 followed.

(3) In this case what was not certain was the time when the two acts of sexual intercourse took place, whether before or after the 16th birthday of the prosecutrix. This was therefore not a case of the only issue being one of duplicity of charges. The issue of duplicity and its consequences ware subsumed under a more and obvious fundamental infirmity and went to the root of the offence of a rape of a female below 16 years and there was a reasonable doubt

as to whether the two acts of sexual intercourse took place when the prosecutrix was below 16 years of age (see p 279D–E). A

[Bahasa Malaysia summary

Tertuduh telah didakwa di bawah s 376 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut') kerana merogol seorang gadis berumur 15 tahun 10 bulan di antara 15 November 1993 dan Januari 1994. Pada akhir kes pendakwaan, hakim perbicaraan telah meminda pertuduhan kepada suatu tuduhan bahawa tertuduh telah merogol gadis tersebut di antara 15 November 1993 and 21 Januari 1994. Dalam meminda pertuduhan tersebut, hakim telah menyatakan bahawa tertuduh telah merogol pengadu tersebut dua kali di antara 15 November 1993 and 21 Januari 1994. Tertuduh telah disabitkan berdasarkan pertuduhan terpinda tersebut. Walau bagaimanapun pertuduhan yang mana beliau dipanggil untuk membuat pembelaan dan atas mana beliau disabitkan kesalahan adalah satu pertuduhan merogol. Di antara isu untuk dipertimbangkan adalah: (i) sama ada perlakuan seks itu telah berlaku sebelum hari jadinya yang ke 16; (ii) sama ada terdapatnya kependuaan pertuduhan; dan (iii) sama ada kependuaan pertuduhan tersebut itu hanyalah suatu luar aturan. B C D

Diputuskan, membenarkan rayuan itu: E

(1) Kes pihak pendakwa adalah berkaitan dengan dua perlakuan kesalahan seks pada tarikh yang berlainan dan di tempat yang berlainan. Jelasnya terdapat dua kesalahan yang berlainan dan oleh yang demikian pertuduhan yang berasingan harus dibuat terhadap tertuduh (lihat ms 279B–C). F

(2) Secara biasanya, kependuaan pertuduhan boleh dianggap sebagai suatu luar aturan sahaja kecuali jika kependuaan tersebut mengandungi dua pilihan dakwaan dalam pertuduhan tersebut dan adalah mustahak kepada tertuduh untuk mengetahui dengan tepatnya dengan apa dia telah dituduh dan berdasarkan apakah beliau disabitkan kesalahan (lihat ms 279C); *See Yew Poo v PP* [1949] MLJ 13, *Yap Leow Swee v PP* [1937] MLJ 225, *PP v Mohamed Fathi* [1979] 2 MLJ 75 dan *Ramachandran v PP* [1972] 2 MLJ 183 diikut. G

(3) Dalam kes ini, apa yang kurang jelas adalah masa apabila dua perlakuan seks tersebut telah berlaku, iaitu sama ada sebelum ataupun selepas hari jadi pengadu yang ke 16. Ini bukanlah kes di mana isu tunggalnya adalah kependuaan pertuduhan. Isu kependuaan pertuduhan dan kesannya adalah dirangkumi oleh suatu kecacatan yang lebih serius dan ketara dan ianya menjejaskan asas kesalahan merogol seseorang gadis berumur di bawah 16 tahun dan oleh itu terdapat keraguan yang munasabah sama ada dua perlakuan seks tersebut telah berlaku ketika pengadu tersebut berumur di bawah 16 tahun (lihat ms 279D–E).] H I

Notes

For cases on duplicity of charges, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 696–714.

Cases referred to

Ali Hyder v Emperor (1939) 40 Cr LJ 280 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
PP v Mohamed Fathi [1979] 2 MLJ 75 (refd)
R v Jones 59 Cr App R 120 (refd)
Ramachandran v PP [1972] 2 MLJ 183 (folld)
See Yew Poo v PP [1949] MLJ 131 (folld)
Yap Leow Swee v PP [1937] MLJ 225 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 112, 158, 163, 173(h), 376
Penal Code (FMS Cap 45) ss 375, 376

Appeal from: Kes Tangkap No 1–62–78–94 (Sessions Court, Kuala Lumpur)

Mohd Ghazali bin Mohd Taib (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh (*Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Cur Adv Vult

KC Vohrah J: The appellant was charged that between 15 November 1993 and January 1994 at the office in Mahendran Sport's Centre at Sentul Pasar, Kuala Lumpur, he committed rape on a girl aged 15 years 10 months, an offence punishable under s 376 of the Penal Code (FMS Cap 45) ('the Code').

Under the fifth description of the definition of rape in s 375 of the Code, a man commits rape who has sexual intercourse with a woman with or without her consent when she is under 16 years of age. The prosecutrix (SP3) in this case was born on 22 January 1978.

At the close of the prosecution's case the learned judge of the sessions court amended the charge to one of the appellant having committed rape on the girl between 15 November 1993 and 21 January 1994 at the office in Mahendran Sport's Centre.

The appellant was convicted on the amended charge and sentenced to 10 years' imprisonment and four strokes of the rattan.

To be noted is that in her grounds of decision, the judge, in amending the charge at the close of the case for the prosecution, mentioned that the accused had raped the girl twice during the period from 15 November

1993 to 21 January 1994. However the charge upon which he was called to make his defence and upon which he was convicted was one single charge of rape. A pertinent question that arises is, upon which particular offence, which particular act of rape, was the accused convicted and sentenced? The offence of rape in law is one single act of unlawful sexual intercourse. It is not a continuing offence (see *Ali Hyder v Emperor* (1939) 40 Cr LJ 280). The charge should have been split by way of amendment for each offence or the prosecution should have been directed to elect upon which offence the trial should have proceeded (see *R v Jones* 59 Cr App R 120 and see ss 158, 173(h) and 376 of the Criminal Procedure Code (FMS Cap 6) ('the CPC')). I shall be reverting to this issue of duplicity of charges later in the judgment.

Encik Karpal Singh's main contention in the appeal is that the learned judge should not have called upon the appellant to make his defence as the prosecution had not proved its case beyond a reasonable doubt. His argument is that the judge had confusingly, in her grounds of decision, stated that the prosecution had made out a prima facie case against the appellant and yet, notwithstanding the decision in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 and now the majority decision in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 affirming *Khoo Hi Chiang*, she had in fact failed to make a maximum evaluation of the prosecution's evidence before calling the appellant to make his defence. Specifically, he pointed out that the judge failed to evaluate the evidence of SP3 in the light of several aspects of the evidence that were adduced, which included, inter alia, a late police report which contradicts her evidence, the many contradictions and inconsistences in her evidence and between her evidence and the evidence of other witnesses, the evidence of prosecution witness Dr Shahrom who made a medical examination on SP3 and who said he disbelieved SP3 when she told him that she had been raped once when the medical evidence showed she had had multiple sexual intercourse.

A perusal of the learned judge's written grounds of decision does show that she did merely narrate the prosecution's evidence at the close of the case of the prosecution without any evaluation of the evidence after which she stated that a prima facie case beyond a reasonable doubt had been made out. However that is not to say that she did not set out in her written judgment her evaluation. She did so but only after she had stated and considered the defence evidence which was a denial that he had any sexual intercourse with SP3. That may have been the form or style she chose to write her judgment and the point to consider then is whether that does give an indication that she did evaluate the prosecution evidence before she called upon the appellant to make his defence.

Looking at the judgment as a whole, it may be said that she did generally evaluate the evidence and her finding that the incidents of sexual intercourse did take place can be justified. However, it is unfortunate that her evaluation of SP3's evidence did not pay attention, which was necessary, to the contradictions in the approximate times when the sexual intercourse took place having regard to the fact that SP3 celebrated her 16th birthday

on 22 January 1994 and that any intercourse after that date which was consensual does not constitute rape.

The evidence of SP3 was that she was a student of Sekolah Menengah Bandar Baru Sentul in 1993 and 1994 and that she took part in the game of hockey where she represented the school and a team called Kelab Bakat Kuala Lumpur. She said that the hockey coach for both the school and the club was the appellant. During training she became close to the appellant and assisted him in his shop, Mahendran Sport's Centre. She used to sleep nights at the office of the shop together with SP4, her school mate.

She stated that towards the end of the November 1993 school holidays, she worked for the appellant and during one night she spent in the shop, the appellant fondled and kissed her on the sofa. She testified that SP4 was not aware of it as she was asleep. She stated that she felt the appellant insert his male member into her private part and she was naked at that time. While having the connection the appellant told her that he loved her and that he wanted to divorce his wife to marry her and she said that she was willing to marry him.

Her further evidence was that after this incident of rape there was another incident of rape, this time in the bathroom of the accused's shop. She said that it took place on a day quite near to her 16th birthday and she felt that it was in January 1994.

She also gave evidence of another sexual connection with him which she said took place after her 16th birthday.

In addition she testified that at various times during the time the appellant was coaching the team, he had kissed and fondled her. Though there was no evidence by others including SP4 as to the three incidents of intercourse, there were several girls who gave evidence relating to the conduct of the appellant that he kissed and fondled them and that the appellant and SP3 were unusually close, with many incidents of them behaving like lovers.

The learned judge made a finding that SP3 had had sexual intercourse with the appellant thrice. Medical evidence did establish that SP3 had had multiple intercourse but the medical evidence related to the clinical examination of the girl some 2½ months after her 16th birthday. The learned judge also held that two of these incidents of intercourse constituted rape as they took place before SP3's 16th birthday whereas the third incident of intercourse took place after her birthday. It is clear, however, that she relied solely on the evidence of SP3, the prosecutrix, for her findings on the approximate times of the sexual intercourse.

The learned judge should have noticed that while SP3 had stated that one act took place before 1994 and the other act took place on a day near her birthday and that she felt this was in January 1994, yet under cross-examination she was categorical that both acts took place in 1993. Her evidence clearly showed her uncertainty about the dates. However this is not all.

The learned judge failed to consider discrepancies in the police report of SP3 made on 4 April 1994, some 2½ months after her birthday.

The report contradicts her evidence as to the times when the incidents of intercourse took place. It is also clear that she did not take into account the evidence of SP13, Chief Inspector Zaiton, who was the one who recorded the police report of SP3 (exh P4) in regard to the discrepancies in the dates.

SP13 told the court that SP3 had difficulty in fixing the time of the event. She said that she subsequently took a statement from her under s 112 of the CPC and she had to do it twice as there was a discrepancy between her statement and the police report. She stated that the discrepancy was in relation to fixing the date of incident — in the police report the date of the incident was January 1994 whereas in the statement SP3 had fixed the date of the incident as being at the end of November 1993. SP13 said that she realized that the discrepancy was important as after 22 January 1994, SP3 was 16 years old ('Perbezaan itu ialah tentang anggaran tarikh kejadian — dalam laporan polis, pengadu mendakwa dalam bulan Januari 1994 tetapi dalam percakapan yang diambil pada 24 Mei 1994 dia beritahu tarikh anggaran kejadian berlaku ialah pada penghujung bulan November 1993. Ini adalah penting. Selepas 22 Januari 1994, umur (SP3) genap 16 tahun').

Inspector Zaiton was quite right when she said that it was important to clarify the discrepancy as to the date; it made all the difference whether the two incidents of intercourse which the learned judge said constituted rape were indeed statutory rape or mere acts of consensual sex between two parties above 16 years old.

This is what the prosecutrix said in her police report (certified translation from Bahasa Malaysia) with regard to the acts of sexual intercourse which she had with the appellant:

> One day, in the month of January, 1994, Mahendran asked me to do some work in his office together with SP4. That night the three of us slept there where Mahendran had sexual intercourse with me without my consent and told me not to tell anyone. This happened twice at the same place and besides that I was merely being fondled and kissed. The last time I had sexual intercourse was during the last hari raya. (Pada suatu hari, dalam bulan Januari, 1994, Mahendran panggil saya buat kerja di pejabatnya dengan SP4. Pada malam itu kami bertiga bermalam di situ, di mana Mahendran telah menyetubuhi saya tanpa kerelaan saya dan suruh saya jangan beritahu sesiapa. Kejadian ini berulang sebanyak dua kali lagi di tempat yang sama dan di samping itu saya cuma diraba dan dicium. Kali terakhir saya disetubuhi sebelum hari raya lalu).

It can be seen in the police report that the acts of intercourse took place in January 1994, flatly contradicting the evidence of SP3 on very material particulars. Was the first act of intercourse at the end of November 1993 or January 1994? If it was in January, was it before her 16th birthday which was celebrated on 22 January 1994 or after her birthday?

There is clearly uncertainty as to whether the sexual connections took place before or after her 16th birthday. If any of the acts took place after her 16th birthday were they consensual or forced upon her? The issue of whether the first two connections were consensual was not dealt with by

A the learned judge as she considered that the acts had taken place before her 16th birthday. And that leads me to the issue of duplicity of charges.

Under s 163 of the CPC, for every distinct offence of which any person is accused, there shall be a separate charge. As was pointed out earlier, the offence of rape is not a continuing offence; the offence of rape
B is one single act of unlawful sexual intercourse. The prosecution's case related to two acts of unlawful sexual intercourse on two different dates and at two different places and clearly two different distinct offences and therefore two separate charges ought to have been framed against the appellant. Ordinarily the duplicity in a charge may be treated as a mere irregularity unless the duplicity consists of two alternative charges in the
C charge and it is impossible for the defendant to know with certainty with what he was charged and of what he was convicted (see Court of Appeal case of *See Yew Poo v PP* [1949] MLJ 131 relying on *Yap Leow Swee v PP* [1937] MLJ 225, *PP v Mohamed Fathi* [1979] 2 MLJ 75, *Ramachandran v PP* [1972] 2 MLJ 183; see however *R v Jones* 59 Cr App R 120).

D In the case under review although the accused was convicted on one offence of rape under one charge, the learned judge had taken into account two acts of sexual intercourse under one charge. As was discussed earlier in the judgment what is not certain is the time when the two acts of sexual intercourse took place, whether before or after the 16th birthday of SP3. This is thus not a case of the only issue being one of duplicity of charges.
E The issue of duplicity and of its consequences are subsumed under a more and obvious fundamental infirmity that goes to the root of the offence of rape of a female under the age of 16 — that there is reasonable doubt as to whether the two acts of sexual intercourse took place when the female was aged below 16.

F The law has to take its course. I have to resolve the doubt in favour of the appellant and accordingly I allow the appeal. I set aside the conviction and sentence.

Appeal allowed.

G Reported by Izzatty Izzuddin

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